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| APPLICATION NO.  | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 09/809,744   | 03/15/2001  | Alexander L. Darbut  | R120.12-0033        | 5344             |
| 27367  | 7590        | 10/05/2004           | EXAMINER            |                  |
| WESTMAN CHAMPLIN & KELLY, P.A.<br>SUITE 1600 - INTERNATIONAL CENTRE<br>900 SECOND AVENUE SOUTH<br>MINNEAPOLIS, MN 55402-3319 |             |                      | WOO, STELLA L       |                  |
|  |             |                      | ART UNIT            | PAPER NUMBER     |
|  |             |                      | 2643                |                  |

DATE MAILED: 10/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

09/809,744

**Applicant(s)**

DARBUT, ALEXANDER L.

**Examiner**

Stella L. Woo

**Art Unit**

2643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 15 March 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |  |
|---|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)            |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>10-19-01, 04-16-03</u> | 6) <input type="checkbox"/> Other: ____  |

## DETAILED ACTION

### *Double Patenting*

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-20 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-36 of U.S. Patent No. 6,690,806 in view of Killion et al. (US 6,151,399, hereinafter "Killion").

Claims 1-36 of the Killion patent is the same as claims 1-20 of the present invention except it does not specify first and second sets of leads. However, Killion teaches the well known use of two sets of leads (wires 26 and 28; Fig. 4A) for selectively placing either the first or second acoustic passage in an acoustic receptive state (col. 8, lines 10-17) such that it would have been obvious to an artisan of ordinary skill to incorporate such first and second sets of leads, as taught by Killion, within the microphone construction claimed in applicant's patent U.S. Pat. No. 6,690,806 in order to position either the first and second acoustic passages in a receptive state by completing a first or second electric circuit.

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3. Claims 1-5, 12-18 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of U.S. Patent No. 6,597,793 in view of Killion for the same reasons given above.

***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

5. Claims 1, 13 are rejected under 35 U.S.C. 102(e) as being anticipated by Killion.

Regarding claims 1, 13, Killion discloses a microphone construction (directional microphone system for an in-the-ear hearing aid) comprising:

a housing (capsule 40) having first and second acoustic passages (tubings 85 and 86; Fig. 4A) communicating with a microphone retaining chamber (holding microphone cartridges 20, 30), each acoustic passage extending through the housing to an exterior surface thereof (inlets 83 and 84 in the top plate 80; Fig. 4B);

a first set of leads (wires 26);

a second set of leads (wires 28);

a microphone having a first and second acoustic ports (directional microphone 20 and omnidirectional microphone 30; Fig. 5); and

a switching mechanism (switch 55; Figs. 1B and 5).

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6. Claims 1-5, 13-15, 17-20 are rejected under 35 U.S.C. 102(e) as being anticipated by Beard et al. (US 2001/0036287 A1, hereinafter "Beard").

Regarding claims 1, 13, Beard discloses a microphone construction (microphone in a hearing aid device) comprising:

a housing having first and second acoustic passages (apertures 18 and 22) communicating with a microphone retaining chamber (housing of microphone 11);

a first set of leads (Fig. 2, contacts 24 and 26);

a second set of leads (Fig. 2, contacts 26 and 28);

a microphone (microphone 11 has a directional mode and an omnidirectional mode; page 1, paragraph 16); and

a switching mechanism (switch 10; paragraphs 16-17).

Regarding claims 2-3, 17, switch lever 30 is slidably disposed within the switch receptacle 16 (Fig. 1; paragraph 17).

Regarding claims 4, 18-20, switch lever 30 has a curved upper portion and a flat lower portion (see Figure 1).

Regarding claims 5, 14-15, Beard teaches the switch being provided with a rotor actuator 102 instead of the switch lever 30 (Figs. 3 and 4; paragraphs 18 and 19).

### ***Conclusion***

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Berland, Bryant et al. and Cole show other microphone devices with slidably secured

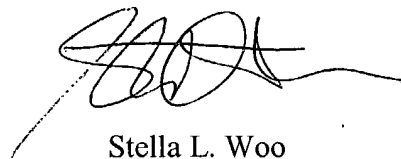
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switches. Killion (US 3,835,263), Killion et al. (US 5,524,056) and Killion et al. (US 5,878,147) show other hearing aids with plural microphones.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Stella L. Woo whose telephone number is (703) 305-4395. The examiner can normally be reached on Monday-Tuesday, Thursday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Curtis Kuntz can be reached on (703) 305-4708. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to be 'Stella L. Woo', with a long horizontal line extending to the right.

Stella L. Woo  
Primary Examiner  
Art Unit 2643